91-988

①

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1991

DONNIE R. FINLEY, et al.,

Petitioners,

v.

HOECHST CELANESE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the appellate court err in interpreting key provisions of the Merger Agreement negotiated by the parties to a corporate merger to adversely exclude petitioners from receiving "two-for-one" severance benefits?

2. Did the appellate court err in not recognizing under federal common law that an employer can create contractually vested welfare benefits that exceed the requirements of the Employee Retirement Income Security Act of 1974, 28 U.S.C. § 1001, et seq. ("ERISA"), in conflict with the Sixth, Seventh, and Eighth Circuit Courts of Appeals?

LIST OF PARTIES
IN THE COURT OF APPEALS

In the Court of Appeals, the appellants were: Donnie R. Finley, Ralph E. Adams, Minnie R. Aiken, Jacob F. Anthony, John F. Armstrong, Laura T. Armstrong, Larry P. Arnold, John L. Austin, Larry F. Austin, Harold L. Ball, Terry L. Ballard, T.L. Ballew, Shirley H. Barton, Donald E. Batson, Joanne P. Beresh, Luree Blassingame, Libby M. Bracken, Roy E. Brown, Mary C. Bruce, Barbara E. Bruster, Hazel M. Bryant, Rodger L. Burton, Edith E. Butler, Lela M. Butler, Roy S. Cagle, Julia L. Carter, George D. Carter, Jr., Gene C. Casey, Lewis E. Casey, Hazel T. Channell, Harry J. Cline, Dorothy B. Clinkscales, Gene L. Conwell, Marie R. Creamer, Raymond P. Crone, Martha A. Cureton, Emmett B. Dailey, Lois S. Davis, James E. Day, Eliza Dennis, James H. Durham, Juanita

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Wheeler, Benjamin L. Williams, James O. Williams, Martha C. Williams, Martha M. Williams, Ricky D. Williams, Patricia B. Wilson, Phillip M. Witham, Mary H. Wofford, Cornell Wrice, Jr., Gloria G. Young, and Clifton O. Zimmerman.

The appellant was Hoechst Celanese Corporation.

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The opinion of the United States Court of Appeals for the Fourth Circuit (App. A, _infra,_ A-1 -- A-19) and the order of the district court (App. B, _infra,_ B-1-B 33) are unpublished.

JURISDICTION

Petitioners originally filed their suits in state courts asserting claims under state law. Respondent removed the actions to the United States District Court for the District of South Carolina on the basis of 28 U.S.C. 1331, asserting preemption of state law under ERISA.

On June 22, 1990, the district court entered an order, granting summary judgment in favor of respondent.

On petitioners' appeal, the Fourth Circuit Court of Appeals on August 21, 1991,

entered an order affirming the district court.

On September 16, 1991, the Fourth Circuit Court of Appeals denied petitioners' petition for rehearing and suggestion for rehearing in banc.

The jurisdiction of this Court to review the judgment of the Fourth Circuit Court of Appeals is based on 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 1002(1) of title 29 of the United States Code.

Section 1002(1) provides that an employee welfare benefit plan is:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or an employee organization, or both, to the extent such plan, fund, or program was established or maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, ... medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death, or unemployment.

STATEMENT OF THE CASE

This case concerns whether petitioners are entitled to receive severance benefits pursuant to a November 2, 1986 Merger Agreement ("Merger Agreement") between Celanese Corporation and American Hoechst. The Merger Agreement led to the surviving corporation, respondent Hoechst Celanese Corporation ("Hoechst Celanese").

Prior to the Merger Agreement, petitioners worked for the Celanese Corporation at a plant located in Greenville, South Carolina. After the Merger Agreement took effect on February 27, 1987, petitioners became employees of respondent. All petitioners were terminated other than for cause prior to January 1, 1989.

Schedule 7.7 (h) of the Merger Agreement provides that all employees of Celanese terminated after the Merger Agreement became effective and for other than cause, would receive "two for one" severance benefits:

Specifically, it states:

> <u>Notwithstanding</u> the terms of the Company's [Celanese Corporation] salary continuation or written separation pay policy, <u>for each employee</u> of the Company ... whose employment is hereafter terminated ... buyer will provide, or will cause the Company or Surviving Corporation to provide ... <u>separation pay</u> ... <u>equal to two weeks' base salary for each full or partial year service with the Company and Surviving Corporation plus an additional two weeks' base salary.</u> (emphasis added.)

In addition, the Merger Agreement in Section 10.5 provides that petitioners have the right to enforce Schedule 7.7(h) against respondent:

> ... it is expressly agreed that all of the persons (and their successors and assigns) who are beneficiaries of Section 7.7 (including Schedule 7.7)... (whether as individuals or members of a class or group) shall be entitled to enforce such Sections and Schedule against the Parent or the Surviving Corporation.

Further, the Merger Agreement specifically prohibits amendment of Schedule 7.7 (h) <u>before or after</u> the effective date of the merger if

the amendment would adversely affect petitioners. Section 9.3 states:

> ... and, provided further, that at no time before or after the Effective Time [of the Merger Agreement, or February 27, 1987] may any amendment be made to Section 7.7 (including Schedule 7.7) ... that would adversely affect ... the employees of the Company. (emphasis added.)

Notwithstanding the prohibition against amendment and the rights of the employees to enforce the severance benefits set out in the Schedule 7.7(h), an "Amendment to Agreement to Merger" ("Amendment"), dated February 20, 1987, was filed with the Securities and Exchange Commission three days before the effective date of the merger. Item 4 of the Amendment provides that Schedule 7.7 (h) is amended to exclude petitioners from the "two for one" severance pay benefits. The exclusion was based on "the previously announced shutdown of the Company's Greenville, South Carolina plant...."

Approximately two years prior to the merger, Celanese announced plans to shutdown the Greenville plant where petitioners were working at the time of the merger, and in fact, had phased out some employees prior to the time of the merger. Nonetheless, after the merger became effective, all petitioners worked for respondent at the Greenville plant, some for as long as a year.

When terminated by respondent, petitioners received one week base salary for each full or partial year of service plus one week base salary or the "one for one" package. The "one for one" package was the severance benefits arrangement in effect for Celanese employees prior to the Merger Agreement. Petitioners never received the "two for one" benefits set out in the Merger Agreement. Therefore, they received one-half of what was promised to them in the Merger Agreement.

Petitioners brought their individual suits

in state court seeking additional severance benefits and asserting claims under state law. Respondent removed the actions to federal court on the basis of federal question jurisdiction, claiming preemption of state law under ERISA. Petitioners did not contest removal and filed amended complaints pursuant to ERISA for alleged violations of fiduciary duties and other provisions of the Act.

The parties stipulated that there were no factual issues to be determined and summary judgment motions were filed by the both sides. On June 12, 1990, the district court issued an order dismissing 14 employees who the court determined were terminated prior to November 2, 1986 --the date of the Merger Agreement. (That order is not before this Court.) The court also issued an order dated June 22, 1990, granting summary judgment in favor of respondent and against the remaining 153 employees.

The Fourth Circuit Court of Appeals affirmed, holding that the district court correctly interpreted the Merger Agreement to exclude petitioners from receiving the "two for one" benefits, and that these benefits were not protected by ERISA.

REASONS FOR GRANTING THE WRIT

I. THE APPELLATE COURT ERRED IN INTERPRETING KEY PROVISIONS OF THE MERGER AGREEMENT NEGOTIATED BY THE PARTIES TO A CORPORATE MERGER TO ADVERSELY EXCLUDE PETITIONERS FROM RECEIVING "TWO-FOR-ONE" SEVERANCE BENEFITS.

The Court of Appeals, in affirming the district court, held that the Merger Agreement's "two for one" severance pay benefits applied "solely to those employees who 'hereafter' were terminated by the surviving corporation [respondent] as a result of the merger, and not as a result of a prior decision to close the Greenville plant."Opinion at A-13.

The Court of Appeals reached this conclusion by making six errors in reading the Merger Agreement, violating basic principles governing the interpretation of contracts. As a result of these errors, the Court has substantially rewritten the contract between the merging parties.

First, the Court of Appeals stated that the Merger Agreement "included a clause which provided that any Celanese employee who was thereafter terminated <u>as a result of the merger</u> would receive added severance benefits."A-6. (emphasis added.) The Court of Appeals relied on "Section 7.7 (h)" to support its statement. App. A-6.

This is a clear misreading of the Merger Agreement. The words "as a result of the merger" do not appear in Section 7.7 (h) of the Merger Agreement.

Presumably the Court of Appeals intended to cite Schedule 7.7(h) of the Merger Agreement

to support its statement. Schedule 7.7(h) outlines the "two for one" benefits package for all employees "hereafter terminated" by respondents. If so, the Court again erred. There is no phrase "as a result of the merger" contained in Schedule 7.7(h) either. The Court of Appeals later admits that, when it states that Schedule 7.7(h) of the Merger Agreement "does not expressly state that the termination must relate to the merger."

Putting aside the confusion of the Court of Appeals, the fact of the matter is that no where in the Merger Agreement does it say that only employees "hereafter terminated as a result of the merger" are entitled to "two for one" severance benefits.

Second, the Court of Appeals determined that to interpret Schedule 7.7(h) to include petitioners, would be inconsistent with Section 7.7 (b) of the Merger Agreement. A-12. Section 7.7(b) recognizes that certain employee benefit

plans were being modified by the Merger Agreement, but does not list the Celanese "one for one" severance plan.

The Court of Appeals, in reaching this conclusion, ignored the purpose of Section 7.7(b) and overlooked Exhibit 1 to Section 7.7(b). Section 7.7(b) dealt with executive benefit plans only, such as golden parachutes, and not the rank and file employees' benefit plans. This is borne out by Exhibit 1 which lists the various executive benefit plans modified by the Merger Agreement.

The rank and file employees' benefit plans are discussed in Section 7.7 and Schedule 7.7(h). Therefore, Section 7.7(b) has no effect on Schedule 7.7(h) and petitioners' claims whatsoever.

Third, the Court of Appeals read Section 7.7(c) of the Merger Agreement as further evidence that the Merger Agreement's "two for one" package did not apply to petitioners.A-13.

Again, the Court of Appeals either misread or did not understand the meaning of Section 7.7(c) of the Merger Agreement.

Section 7.7(c) deals with all types of benefits for employees, and not simply severance benefits. A close reading of Section 7.7(c) shows it is intended to protect the employees against a future reduction of all types of benefits for two years. It is not logical to construe, as the Court of Appeals did, this <u>protection</u> of employees' benefits as a <u>limitation</u> of employees' benefits. Simply said, in Section 7.7(c), the parties to the Merger Agreement agreed not to reduce the Celanese employees' benefits --this certainly is not evidence that the parties intended to exclude petitioners from receiving additional severance pay benefits.

Fourth, based on Sections 7(b) and 7(c), the Court of Appeals concluded that "the Merger Agreement was never intended to modify or

supersede the Celanese plan that existed prior to the Merger Agreement." A-14.

However, in reaching this conclusion, the Court of Appeals totally ignored the language of Schedule 7.7 (h), stating all employees "terminated hereafter" will receive two for one benefits --

> Notwithstanding the terms of the Company's [Celanese's] salary continuation or written separation pay policy, for each employee of the Company ....

The decision of the Court of Appeals renders this language meaningless.

Fifth, the Court of Appeals relied on the "Amendment to Agreement to Merger," ("Amendment") to bolster its interpretation of the Merger Agreement. This reliance is misplaced. Section 9.3 of the Merger Agreement specifically prohibited amendments -- <u>before</u> and <u>after</u> the effective date of the merger, that deprived employees of benefits granted by the Merger Agreement. The Amendment, executed a

few days before the merger became effective, excluded petitioners from receiving the "two for one" benefits plan. The Amendment, therefore, was not valid.

Also, in an apparent attempt to get around the plain language of Section 9.3, the Court of Appeals said the Amendment was really not an amendment, but a "clarification" which was not in conflict with the original express language of the Merger Agreement, and which makes "clear the previous ambiguity in the original agreement." A-14.

This logic is simply not supported by the plan language of the contract. The Merger Agreement was not ambiguous; and the later attempted Amendment was just that --an amendment, which was clearly prohibited by the Merger Agreement.

Sixth, it should be noted that the Court of Appeals mischaracterizes the Merger Agreement as the "original draft of the

agreement," suggesting that the Merger Agreement signed by the parties on November 2, 1986 was not the final agreement of merger.A-8. This is simply not the case. There was one Merger Agreement. That was the Merger Agreement signed November 2, 1986.

Finally, the effect of the Court's interpretation of the Merger Agreement is astounding. The Court has rewritten the contract in a way that substantially alters the rights and liabilities of the parties and beneficiaries to the contract. The Court has:

* pencilled in the phrase "as a result of the merger" in Schedule 7.7(h) following the phrase "hereafter terminated;

* cut out the phrase "notwithstanding the terms of the Company's [Celanese'] salary, continuation or written separation pay policy,...." in Schedule 7.7(h);

* cut out the phrase "provided, further, that at no time before or after the Effective Time may any amendment be made to Sections 7.7 (including Schedule 7.7).... that would adversely affect the ...

employees of the Company [Celanese] ...." in Section 9.3; and,

* cut out the phrase "...it is expressly agreed that all of the persons (and their successors and assigns) who are beneficiaries of Sections 7.7 (including Schedule 7.7),... (whether as individuals or members of a class or group) shall be entitled to enforce such Sections and Schedule against the Parent or the Surviving Corporation [respondent]...." in Section 10.6.

II. THE APPELLATE COURT ERRED IN NOT RECOGNIZING UNDER FEDERAL COMMON LAW THAT AN EMPLOYER CAN CREATE CONTRACTUALLY VESTED WELFARE BENEFITS THAT EXCEED THE REQUIREMENTS OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, 28 U.S.C. § 1001, et seq., ("ERISA"), IN CONFLICT WITH THE SIXTH, SEVENTH, AND EIGHTH CIRCUIT COURTS OF APPEALS.

The Court of Appeals found that even if the employees were included in the Merger Agreement, the "two for one" severance benefits did not vest at the time of the Merger

Agreement. Therefore, the parties to the Merger Agreement were free to eliminate the "two for one" severance benefits in the Amendment. A-19. The Fourth Circuit's ruling directly conflicts with the law of the Sixth, Seventh, and Eighth Circuit Courts of Appeals, which holds that under federal common law, an employer may vest severance benefits by clear, written expression of intent to do so, after which time the employer may not eliminate those benefit entitlements.

In Anderson v. John Morrell & Co., 830 F.2d 872 (8th Cir. 1987), the Eighth Circuit Court of Appeals held that it is consistent with the intent of Congress for an employer, under ERISA, to set out in a plan document vested welfare benefits. The Eighth Circuit further held that "to accomplish that result, there must be a specific, if not written, expression of the employer's intent to be bound." Id., at 877. See also: Howe v. Varity

Corp., 896 F.2d 1107 (8th Cir. 1990)(welfare benefits did not vest where employer expressly reserved right in plan document to terminate or amend plan.)

Similarly, in Ryan v. Chromalloy American Corp., 877 F.2d 598, 603 (7th Cir. 1989), the Seventh Circuit Court of Appeals held that parties are free to subject welfare benefits to vesting requirements not provided by ERISA. And, the Sixth Circuit Court of Appeals in Hansen v. White Farm Equipment Co., 788 F.2d 1186, 1193 (6th Cir. 1986) held that parties "may themselves set out by agreement or by private design, as set out in plan documents whether welfare benefits vest or whether they may be terminated."

In this case, the Fourth Circuit Court of Appeals correctly held that severance pay, under ERISA, are both contingent and unaccrued, and therefore, a company may unilaterally amend a severance pay policy plan. However, what the

Court of Appeals refused to recognize is that federal common law allows an employer by clear and unequivocal language to vested severance benefits in a plan document, after which time the employer may no longer unilaterally amend its severance policy.

As discussed earlier, Schedule 7.7(h) entitles petitioners to "two for one" severance benefits. Also, Section 9.3 of the Merger Agreement specifically prohibits any amendment to Schedule 7.7(h) that would adversely affect the petitioners.

As further evidence of the parties' intent to be bound to the severance benefits outlined in Schedule 7.7(h), the petitioners were given the right to enforce Section 7.7(h) against respondent. This right is set forth in Section 10.6 of the Merger Agreement.

It is hard to imagine language in a plan document that could be any more clear of an intent to vest severance benefits than the

language used in the Merger Agreement. The Fourth Circuit's finding, in the face of this clear and simple language, that the parties were free to amend the Merger Agreement means, in effect, that in the Fourth Circuit, severance benefits under Section 1002 of ERISA will always be contingent and unaccrued. This is in direct conflict with the decisions of the Sixth, Seventh and Eighth Circuits. Petitioners respectfully request this Court to grant a writ of certiorari to resolve the conflict between the circuits concerning whether a plan participant can acquire vested contractual rights to unaccrued and contingent benefits under federal common law, based on the employer's plan document.

The decision of the Fourth Circuit also means that under ERISA, an employer can always avoid its previously stated, clear and unequivocal intent to provide its employees with welfare benefits. Surely, this is not

what Congress intended when it passed ERISA.

Finally, it is well-established that a court has no authority to draft the substantive content of a welfare benefit plan. Blau v. Del Monte Corp., 748 F.2d 1348, 1353 (9th Cir. 1984), cert. denied, 474 U.S. 865 (1985). However, that is exactly what happened here. The Court of Appeals rewrote Schedule 7.7 (h) and Section 9.3 to reduce the scope of employees entitled to the "two for one" package under the Merger Agreement.

In sum, the respondents have not received what was promised to them in the Merger Agreement.

CONCLUSION

For the foregoing reasons, petitioners respectfully request this Court to grant this petition and issue a writ of certiorari to the Fourth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNPUBLISHED

UNITED STATES COURT
OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-2423

Donnie R. Finley, Ralph E. Adams, Minnie R. Aiken, Jacob F. Anthony, John F. Armstrong, Laura T. Armstrong, Larry P. Arnold, John L. Austin, Larry F. Austin, Harold L. Ball, Terry L. Ballard, T.L. Ballew, Shirley H. Barton, Donald E. Batson, Joanne P. Beresh, Luree Blassingame, Libby M. Bracken, Roy E. Brown, Mary C. Bruce, Barbara E. Bruster, Hazel M. Bryant, Rodger L. Burton, Edith E. Butler, Lela M. Butler, Roy S. Cagle, Julia L. Carter, George D. Carter, Jr., Gene C. Casey, Lewis E. Casey, Hazel T. Channell, Harry J. Cline, Dorothy B. Clinkscales, Gene L. Conwell, Marie R. Creamer, Raymond P. Crone, Martha A. Cureton, Emmett B. Dailey, Lois S. Davis, James E. Day, Eliza Dennis, James H. Durham, Juanita Durham, James M. Edens, Faye ElginBates, Mahlon C. Ellison, Eunice A. Evans, Lee J. Farmer, Maryland J. Farmer, Esther L. Ferguson, Heartie M. Ferguson, Jerry Q. Finley, Robert D. Fisher, Jimmy R. Foster, Azalee M. Fredell, Julia M. Gallimore, Virginia Garrett, Personal Representative of the Estate of David M. Garrett, Shirley M. Garrett, James M. Gilliland, Fannie K. Graffinreed, George B. Grant, Herman D. Grant, Wayne D. Grant, William R. Grant, Charles L. Gray, John D. Griffin, Alpha H. Grubbs, Doris M. Hamer, Margaret G.

Hanson, Frances Harrison, Michael F. Howard, Barbara M. Hunt, Odell Hunter, John R. Hutchins, Nellie K. Hutchens, Larry E. Hutchins, Lois E. Irby, Melvin C. Irby, Charles G. James, Vivian W. Jenkins, Dorothy G. Johnson, Beattie G. Jones, Ella M. Jones, Cal Jones, Jr., Connie J. Kane-McGuire, Jack A. Kelley, Madge F. Kirby, Eff Knight, Jr., Henry A. Kowaleski, Geraldine Laster, Shirley A. Laster, Roy J. Lesley, Charles Q. Lister, Bobbie P. Lyons, Warren J. Mahaffey, Barbara R. Manley, Donald E. Mason, Julia E. McGee, Elberta McKelvie, Curtis E. McKenzie, Ann D. McMakin, Vernon L. McMakin, Betty M. Melton, Franklin W. Mitchell, Merle Mitchell, Buddy W. Mull, Carolyn A. Neely, Betty J. Nicholson, Harold Odom, Steven F. Payne, Fred N. Peace, Joseph Phelps, Shelby M. Powell, Janet N. Pritchett, Mary E. Pruitt, Margaret J. Reed, Alphesus W. Rentz, Ruby C. Rice, William E. Riddle, Sylvia D. Roach, Joyce T. Robison, Susie J. Rosemond, Leroy Sanders, Essie S. Simmons, Brenda J. Simpson, James E. Sims, Jurline Sims, Bennie L. Smith, Daisy S. Smith, John T. Smith, Larry K. Smith, John A. Spillers, Roy M. Spurgeon, Margaret E. Starks, Willie L. Stephens, Mary E. Sweeney, William R. Taylor, Edward W. Thompson, Bobby L. Tolbert, Daisy V. Tolbert, Mary A. Turner, Frances G. Ware, Linda D. Ware, Beedie D. Watson, Clarence L. Webb, Sally M. Webb, Mildred B. Weeks, David M. Weisner, Sanford R. Welborn, Robert G. Wheeler, Benjamin L. Williams, James O. Williams, Martha C. Williams, Martha M. Williams, Ricky D. Williams, Patricia B. Wilson, Phillip M. Witham, Mary H. Wofford, Cornell Wrice, Jr., Gloria G. Young, and Clifton O. Zimmerman,

Plaintiffs-Appellants,

v.

Hoechst Celanese Corporation,

Defendant-Appellee.

Appeal from the United States District Court for the District of South Carolina, at Greenville. Joseph F. Anderson, Jr., District Judge. (CA-89-1517-17)

Argued: March 4, 1991
Decided: August 21, 1991

Before CHAPMAN, Senior Circuit Judge, BOYLE, United States District Judge for the Eastern District of North Carolina, sitting by designation, and DUPREE, Senior United States District Judge for the Eastern District of North Carolina, sitting by designation.

COUNSEL

ARGUED: Susan Herdina, Bonds & Herdina, Charleston, South Carolina, for Appellants. Madison Baker Wyche, III, Ogletree, Deakins, Nash, Smoak & Stewart, Greenville, South Carolina, for Appellee: ON BRIEF: A.D. Orander, Jr., Easley, South Carolina; Joseph G. Wright, III, Wright and Trammell, Anderson, South Carolina, for Appellants. William H. Floyd, III, Glenn R. Goodwin, Ogletree, Deakins, Nash, Smoak & Stewart, Greenville, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

This is an appeal by a class of plaintiffs, who are former employees of the Celanese Corp., from the trial court's granting of summary judgment against them on their claims for additional separation pay. We find that the trial court properly interpreted the contract involved in these claims and correctly held that the benefits involved in this separation from employment were not protected by the Employee Retirement Income Security Act and we therefore affirm.

I.

Plaintiffs are 169 former employees of Celanese Corp. ("Celanese") who worked in Celanese's Greenville, S.C. plant. In late 1984, Celanese announced that it would close

the Greenville plant. The phaseout was to take place gradually over a three-year period. At that time, company officials designed a separation package for the Greenville employees which entitled them to one week's pay for each year of service with the company (known as the "one-for-one" package, or "single separation pay"). The plan also included various other benefits and is referred to as the "Greenville Plan."

The company immediately communicated the "Greenville Plan" to all of the Greenville employees (including plaintiffs). From January, 1986, through the plant closing in March of 1988, the employees were gradually dismissed and paid their benefit entitlements under the Greenville plan. All of the plaintiffs have thus received at least single separation pay.

During the early stages of the Greenville shutdown, in an entirely unrelated matter,

Celanese began to explore the possibility of a corporation merger with another company, American Hoechst Corp. "Hoechst"). On October 29, 1986, the companies agreed in principle that they would merge. Since Celanese's next scheduled Board of Directors meeting was on November 2, the parties worked diligently to draft a Merger Agreement for the Board's consideration. The agreement was adopted by the Celanese Board at this meeting.

The agreement included a clause which provided that any Celanese employee who was thereafter terminated as a result of the merger would receive added severance benefits. This clause[1] stated that any employee "whose employment is hereafter terminated by Buyer [Hoechst]" would receive severance pay equal to two weeks of pay for each year of service (a "two for one" package or "double severance

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[1] Section 7.7(h).

pay"). The Merger Agreement did not address the Greenville plant, which was already well into the process of shutting down, or the Greenville employees, some of whom had already been terminated and the rest of whom were gradually being severed from the company.

Two other portions of the Merger Agreement are of import to this appeal. One clause[2] stated that the Merger Agreement was not subject to amendment (the "non-amendment clause"). Another provision[3] stated that any beneficiary under the Merger Agreement was entitled to enforce the agreement against the company (the "enforcement clause").

Before the merger became effective, the parties amended the agreement through a document entitled "Amendment to Agreement of Merger." The amendment made certain clarifications in the original agreement. In

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[2] Section 9.9.
[3] Section 10.6.

particular, the amendment clarified the parties' intent regarding the Greenville plant and its employees. The amendment stated that the Greenville employees were not included as "hereafter terminated" employees, and thus were not beneficiaries of the Merger Agreement's provision for double separation pay.

On February 27, 1987, Celanese and Hoechst merged into the "Hoechst Celanese Corporation."

II.

The plaintiffs brought suit, claiming that those Greenville plant employees who were terminated after the effective date of the Merger Agreement are "hereafter terminated" employees under the provisions of the agreement and are thus entitled to double separation pay. Their argument is that since the Greenville employees were not specifically excluded from the original draft of the agreement, they are covered as "hereafter terminated" employees

regardless of when the decision to close their plant or terminate their employment was made. Accordingly, the entitlement to this separation pay would vest upon the execution of the original Merger Agreement. They also assert that their rights to these benefits were irrevocable, by virtue of the nonamendment clause.

In the alternative, the plaintiffs claim that their right to double separation pay is protected under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq. ("ERISA"). They assert that their entitlements arose under the original draft of the Merger Agreement, that these rights were employee benefits and, as such, that the benefits were entitled to plan status and the accompanying protections and guarantees of ERISA.

The district court granted summary judgment for the defendant. The court held that the Merger Agreement did not expressly

cover the Greenville employees and that the other terms of the agreement, as well as the surrounding circumstances, made it clear that the parties did not intend to provide new benefits for those employees who were already being terminated and who were governed by preexisting separation benefits.

With regard to plaintiff's ERISA claims, the court held that even if the Merger Agreement was an employee benefit plan, the potential benefits under the plan were not vested and were therefore subject to elimination or amendment.

III.

The plaintiffs, on appeal, challenge the trial court's interpretation of the Merger Agreement and claim that they should receive double separation pay since they were terminated after the date of the agreement.

The relevant section of the Merger Agreement, 7.7(h), states that double

separation pay was intended for those employees "hereafter terminated." Although the entire Merger Agreement relates to the companies' merger, the sentence giving double separation pay to "hereafter terminated" employees does not explicitly state that the termination must relate to the merger. Appellants assert that this sentence must be enforced in its broadest possible terms, and that the parties' failure to specifically include reference to the merger in this sentence necessitates giving double separation pay to all Hoechst employees in every division. Appellants argue that all employees terminated after the date of the agreement, including those whose termination had no connection to the merger, must be paid double the normal separation benefits.

In interpreting a contract, each provision should be given a meaning that allows the entire contract to be given effect. Such an interpretation is clearly superior to one that

gives a particular sentence a meaning that puts it at odds with the rest of the contract. See Island Creek Coal Co. v. Lake Shore Inc., 832 F.2d 274, 277 (4th Cir. 1987). "[The] universal rule of contract law [is] that, in construing language in a contract, 'an interpretation that gives a reasonable meaning to all parts of the contract will be preferred to one that leaves portions of the contract meaningless....' (citing United States v. Johnson Controls, Inc., 713 F.2d 1541, 1555 (Fed.Cir. 1983); see also Union Inv. Co. v. Fidelity & Deposit Co. of Ind., 549 F.2d 1107, 1110 (6th Cir. 1977).

Plaintiffs' interpretation of the "hereafter terminated" clause must therefore be rejected, as it is inconsistent with the other provisions of the contract. Just prior to the provision relied upon by plaintiff, the agreement in Section 7.7(b) recognized that "certain plans, programs, arrangement, policies

and practices of the Company" were being modified. Several employee benefit plans were listed. The Greenville plan was not included on the list. Thus, the benefits package under which the Greenville employees were covered -- which included single rather than double separation pay--was not intended to be amended by the Merger Agreement.

Additionally, in the next Section, 7.7(c), the parties agreed that the surviving corporation would maintain the existing Celanese benefits plans at least at the level already in force. If plaintiffs' interpretation of the "hereafter terminated" clause is accepted, then Section 7.7(c) loses its meaning. If "hereafter terminated" employees were to mean all employees who were thereafter severed from employment, rather than simply those caused by merger, then there would be no need to provide that existing employee benefits plans could not be reduced.

Instead, a careful reading of these provisions and an examination of their relationship to each other, leads to the conclusion that the Merger Agreement was never intended to modify or supersede the existing Greenville benefit plan. As the trial court found, the agreement was meant to apply solely to those employees who "hereafter" were terminated by the surviving corporation as a result of the merger, and not as a result of a prior business decision to close the Greenville plant.

In addition to the Merger Agreement, the later Amendment also validly showed that the Greenville employees were not to be affected by the merger. The parties, Celanese and American Hoechst, had the right to clarify their intent in such a way that was consistent with the original provisions of the Merger Agreement. The clarification is not in conflict with the original express language in the agreement; it

simply supplements it to make clear the previous ambiguity in the original agreement. Since the clarification is consistent with a permissible reading of the original agreement, it does not materially alter the terms of the original agreement.

The original unamended Merger Agreement, as well as the later clarifications, each independently lead to the same conclusion: the appellants were not included within the scope of the agreement, and are not entitled to added separation benefits.

IV.

Appellants also contend that the court improperly looked to extrinsic evidence to determine the intent of the parties, when it should have simply enforced the unambiguous terms expressed by the face of the contract.

A review of the district court's Order indicates that the court did not, in fact, base its ruling on extrinsic evidence. The Order

clearly interprets the Merger Agreement only on the basis of the agreement's own terms. After doing so, the court stated that "out of an abundance of caution" it would also examine the extrinsic evidence to ensure that this did not vary its ruling. An analysis of the extrinsic evidence was then made, with the result being the same: the contracting parties did not intend to include the Greenville employees as beneficiaries of the Merger Agreement.

V.

Appellants' final argument is that the Merger Agreement constituted an employee benefit plan under ERISA, that the Greenville employees were covered under this plan, and that the benefits under the plan vested immediately. The court held that even if the agreement was an ERISA plan covering the appellants, that the employees' benefits had not yet vested and were thus still subject to later amendment or elimination.

ERISA categorizes employee benefit plans into two types: "employee welfare benefit plans" and "employee pension benefit plans." 29 U.S.C. §§ 1002(2) & 1002(3). Plaintiffs concede that if the Agreement was an ERISA plan, it was a welfare benefit plan.

While both types of plans are subject to ERISA's reporting and disclosure requirements, 29 U.S.C.§§1021-31, and its fiduciary standards for management of plan assets, 29 U.S.C.§§ 1101-1114, welfare benefit plans are <u>not</u> subject to ERISA's strict standards regarding vesting, participation and funding which are imposed on pension plans. <u>Holland</u> v. <u>Burlington Industries, Inc.</u>, 772 F.2d 1140, 1145 (4th Cir. 1985), summarily aff'd <u>sub nom.</u> <u>Brooks</u> v. <u>Burlington Industries, Inc.</u>, 477 U.S. 901 (1986); <u>In re White Farm Equipment Co.</u>, 788 F.2d 1186 (6th Cir. 1986); <u>West</u> v. <u>Greyhound Corp.</u>, 813 F.2d 951 (9th Cir. 1987). Accordingly, any severance benefits given by

the Merger Agreement were unaccrued and had not vested under ERISA. Sejman v. Warner-Lambert Co., Inc., 889 F.2d 1346 (4th Cir. 1989); Sutton v. Weirton Steel Div. of National Steel Corp., 724 F.2d 406 (4th Cir. 1983), cert. denied, 467 U.S. 1205 (1984); Accord, Viggiano v. Shenango China Div. of Anchor Hocking Corp., 750 F.2d 276 (3d Cir. 1984).

When severance benefits are contingent and unaccrued, an employer may unilaterally amend or eliminate the benefits plan without violating ERISA. Sejman, 889 F.2d at 1348-49 (citing Young v. Standard Oil (Indiana), 849 F.2d 1039, 1045 (7th Cir. 1988)).

> An employer is therefore free to alter or eliminate severance benefits (which are usually solely funded by the employer) without consideration of the employees' interests. In short an employer does not owe its employees a fiduciary duty when it amends or abolishes a severance benefit plan.

Young, 849 F.2d at 1045.

Accordingly, the contracting parties were free to alter or eliminate any severance benefits which the Merger Agreement conferred on the appellants. The companies did, in fact, eliminate these benefits through the "Amendment to Agreement of Merger."

VI.

Appellants have raised other challenges which we have reviewed and find meritless. For the foregoing reasons, the summary judgment against all appellants' claims is

AFFIRMED.

APPENDIX B

FILED
JUNE 22, 1990

ANN A. BIRCH,
CLERK

U.S. DISTRICT COURT

ENTERED
JUNE 22, 1990

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF GREENVILLE

GREENVILLE DIVISION

Donnie R. Finley, et al.,	C/A No. 6:89-1517-17
Plaintiff,	(Consolidated Cases)
vs.	
Hoechst Celanese Corporation,	ORDER
Defendant.	

Donnie R. Finley and one hundred sixty-seven other plaintiffs,[1] all former employees

[1]Of this original number, only one hundred fifty-three other plaintiffs remain in the case. By order dated June 13, 1990, this court dismissed the actions of fourteen plaintiffs who were dismissed from Celanese prior to the date of the November Merger Agreement.

of Celanese Corporation, ("Celanese") brought this action seeking additional severance pay benefits pursuant to a November 2, 1986 Merger Agreement (hereinafter "November Merger Agreement") between Celanese Corporation and American Hoechst Corporation.[2] All plaintiffs were Celanese employees prior to November 1986, became employees of Hoechst Celanese Corporation after February 27, 1987, and were terminated (other than for cause) prior to January 1, 1989. All actions filed by plaintiffs were consolidated into the above-referenced caption pursuant to this Court's Order dated August 10, 1989.

Plaintiffs initially filed their suits in state court asserting claims under state law. Defendant removed the actions to this court on the basis of federal question jurisdiction,

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[2]The defendant, Hoechst Celanese Corporation, is the surviving corporation of the merger.

asserting preemption of state law under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq.. Plaintiffs did not contest removal and filed amended complaints pursuant to ERISA for alleged violations of fiduciary duties and other provisions thereof. The matter is now before the court on cross motions for summary judgment. The motions and arguments have been ably and extensively briefed by both parties and include accompanying memoranda and exhibits. In addition to the pleadings, admissions, answers to interrogatories, depositions and legal documents submitted to the court for review, the court has held two hearings for oral arguments. Having made a thorough examination of the record and the applicable law, the court finds that there are no genuine issues of material fact and that the defendant is entitled to judgment as a matter of law.

STATEMENT OF UNCONTESTED FACTS

GREENVILLE PLANT CLOSING: Plaintiffs are all former employees of Celanese Corporation who worked in the Greenville, South Carolina plant prior to November 2, 1986, the date of the November Merger Agreement. In late 1984, Celanese Corporation announced its decision to close the Greenville Plant and consolidate its operations with the Celanese plant in Shelby, North Carolina. The phase-out and consolidation were to take place gradually over a three-year period. At that time, company officials designed a separation package for the Greenville employees which entitled them to one week's pay for each year of service with the company, plus an additional week (known as "single separation pay" or a "one-for-one" package), as well as earned and accrued vacation pay, continuation of certain medical benefits, outplacement assistance, and a special incentive bonus for continuing to work

with the company during phase-out. That entire benefits package is referred to as the "Greenville Plan." Details of the Plan were communicated to the Greenville employees, including all plaintiffs.

In January 1986, Celanese Corporation began to identify and separate affected Greenville employees, a process that continued until final closure of the plant by March 1988. Each and every employee on the Greenville payroll who was terminated during that time period, which includes each and every plaintiff, received the single separation pay and other benefits pursuant to the Greenville plan.

NOVEMBER MERGER AGREEMENT: In the summer of 1986, while the Greenville Plant was in process of closing, Celanese Corporation and American Hoechst Corporation began to explore the possible advantages of a corporate merger. On October 29, 1986, the parties agreed in

principle that the companies should merge if the parties could agree upon all details associated with such a merger. In a short time frame between October 29 and November 2, an agreement of merger was drafted to present to the Celanese Board of Directors on November 2, 1986. The agreement was adopted by the Celanese Board and contained the following provision regarding employee severance pay benefits:

> Schedule 7.7 Employee Benefits (h) Salary Continuation; Separation Pay; Vacation Pay; etc.: Notwithstanding the terms of the Company's (i.e., Celanese Corporation's) salary continuation or written separation pay policy, for each employee of the Company, the Surviving Corporation (i.e., Hoechst Celanese Corporation ...) ...whose employment is hereafter terminated by Buyer..., the Company (at the direction of the Buyer, directly or indirectly), the Surviving Corporation (i.e., Hoechst Celanese Corporation) or its subsidiaries for any reason (other than for cause) at any time prior to January 1, 1989, ...Buyer will provide, or will cause the Company or Surviving Corporation to provide... (ii) for all such

> other employees, separation pay,... equal to two weeks' base salary for each full or partial year of service with the Company and Surviving Corporation plus an additional two weeks' base salary.

This "double separation pay" or a "two-for-two" package is twice the amount specified in the Greenville Plan and received by plaintiffs upon termination.

On February 20, 1987, the Merger Agreement was amended by the parties through a document entitled "Amendment to Agreement of Merger". This document amended Schedule 7.7(h) to specifically exclude from the Merger Agreement's double separation pay provision "the previously announced shutdown of the Company's Greenville, South Carolina plant and the previously announced capacity reduction at the Company's Salisbury, North Carolina plant...". The Amendment was filed with the Securities and Exchange Commission on February 24, 1987, three days before the effective date of the merger. On February 27, 1987, the date

of the merger, The Celanese Interim Separation Pay Plan ("February Plan") was established to "carry out the terms of the merger agreement between Celanese and Hoechst as it applies to separation pay arrangements." Under the terms of the February Plan, Greenville employees were excluded from coverage, pursuant to the February 20th amendment. The February Plan was never implemented at the Greenville plant.

CONTENTIONS OF THE PARTIES

The Greenville Celanese plant closed its doors by the first quarter of 1988. On termination, each plaintiff received the "one for one" severance pay pursuant to the Greenville Plan. Plaintiffs now contend they are entitled to an additional week's pay under the "two-for-one" severance pay provisions of the November 2, 1986 Merger Agreement. Fashioned as an ERISA cause of action, plaintiffs contend the defendant's refusal to pay the double separation pay to Greenville

employees constitutes a direct violation of ERISA and a breach of defendant's fiduciary duties.

Defendants maintain that the Greenville Plan with its single separation pay provision at all times applied to plaintiffs and that plaintiffs have thus received all severance benefits to which they were entitled as well as all those which they could have reasonably expected to receive.

JURISDICTION

This court has original jurisdiction of this matter under the provisions of 29 U.S.C. § 1132(e)(1). ERISA governs employer severance pay plans whether funded from general assets or from a special trust. Holland v. Burlington Industries, Inc., 772 F.2d 1140, 1145 (4th Cir. 1985), summarily aff'd sub nom. Brooks v. Burlington Industries, Inc., 477 U.S. 901 (1986). There is no dispute but that both the Greenville Plan and the February Interim

Separation Pay Plan are established "plans" as defined by ERISA, 29 U.S.C. § 1002(1). There is, however, some dispute over whether the November Merger Agreement constitutes an employee welfare benefit "plan" under ERISA. Plaintiffs allege that the separation pay provisions contained in the Merger Agreement is an ERISA 'plan". Complaint ¶ 16. Defendant maintains that the Merger Agreement merely evidences a preliminary decision to extend certain benefits, subject to Federal Trade Commission approval, and that decision to extend those benefits did not become a reality until the merger agreement was approved by the FTC, and its provision for severance pay as amended was implemented by the February Interim Separation Pay Plan. See, Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982). Alternatively, defendant argues that if the Merger Agreement could be construed as an ERISA "plan", that it was properly amended to exclude

Greenville employees. For the reasons set forth more fully below, plaintiffs' claims fail regardless of whether the November Merger Agreement is characterized as an ERISA "plan" or merely a contract leading up to the establishment of a "plan."

ERISA CLAIMS

For purposes of this portion of the decision, the court assumes, without deciding, that the separation pay provisions of the November Merger Agreement constitute an ERISA plan, and will be hereinafter referred to as the "November Plan". As an initial matter, the court must first address plaintiffs' failure to exhaust any administrative remedies prior to seeking federal court review as well as plaintiffs' argument that exhaustion is futile. Although ERISA does not contain an explicit exhaustion requirement, the general rule in this circuit requires an ERISA claimant to exhaust the remedies provided by the employee

benefit plan as a prerequisite to an ERISA action for denial of benefits under 29 U.S.C. § 1132. Makar v. Health Care Corp. of Mid-Atlantic, 872 F.2d 80, 82 (4th Cir. 1989). However, in this case, not only was there no administrative review or appeals procedure specified in the November Merger Agreement, the court is convinced that any such review would be clearly futile given the positions of the parties and the extensive factual record before the court.[3]

The Court further determines that all of the severance pay plans at issue, including the November plan, are "employee welfare benefit plans" within the meaning of ERISA. Massachusetts v. Morash, 109 S.Ct. 1668 (1989). This characterization is critical to defining plaintiffs' rights under the November

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[3]Further, counsel for defendant has stipulated that any further claim for relief through administrative channels would be denied.

are defined as either "employee pension benefit plans," 29 U.S.C. § 1002(2) or "employee welfare benefit plans, 29 U.S.C. § 1002(3). While both types are subject to ERISA's reporting and disclosure requirements, 29 U.S.C.§§ 1021-1031, and its fiduciary standards for management of plan assets, 29 U.S.C. §§ 1101-1114, welfare benefit plans are not subject to ERISA's strict standards regarding vesting, participation and funding which are imposed on pension plans. Holland, supra; In re White Farm Equipment Co., 788 F.2d 1186 (6th Cir. 1986); West v. Greyhound Corp., 813 F.2d 951 (9th Cir. 1987).

Based on this statutory exclusion, the Fourth Circuit has squarely held that the accrued benefits secured by ERISA do not encompass severance payments. Sejman v. Warner-Lambert Co., Inc., 889 F.2d 1346 (4th Cir. 1989); Sutton v. Weirton Steel Div. of National Steel Corp., 724 F.2d 406 (4th Cir. 1983), cert. denied, 467 U.S. 1205 (1984); Accord,

Viggiano v. Shenango China Div. of Anchor Hocking Corp., 750 F.2d 276 (3d Cir. 1984); Philllips v. Amoco Oil Co., 799 F.2d 1464 (11th Cir. 1986), cert. denied, 481 U.S. 1016 (1987). Because, under ERISA, severance benefits are contingent and unaccrued, an employer may unilaterally amend or eliminate the provisions of a severance plan without violating ERISA. Sejman, 889 F.2d at 1348-49, citing Young v. Standard Oil (Indiana), 849 F.2d 1039, 1045 (7th Cir. 1988).

> This is so because an employer is permitted to act in a dual capacity as both the manager of its business and a fiduciary with respect to unaccrued benefits. An employer is therefore, free to alter or eliminate severance benefits (which are usually solely funded by the employer) without consideration of the employees' interests. (citation omitted). In short an employer does not owe its employees a fiduciary duty when it amends or abolishes a severance benefit plan.

Young, 849 F.2d at 1045.

It is clear from the above authorities that under ERISA, employees have no statutory

right to severance benefits and employers have no continuing obligation to provide them. Sutton, supra. It would appear then that defendant did not violate any provision of ERISA or any fiduciary obligation,[4] by its decision to exclude Greenville employees from the "two-for-one" severance benefits, and should be entitled to summary judgment as a matter of law.

FEDERAL COMMON LAW CLAIMS

However, the inquiry does not end here for plaintiffs contend that even though welfare benefits are not vested as a matter of law under ERISA, there is no provision in ERISA that prevents parties from entering into contractually binding agreements that afford employee-participants more than the required protection called for in the statute.

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[4]The court notes that any recovery for breach of fiduciary duty would inure only to the benefit of the Plan. Massachusetts Mutual Life Insurance Company v. Russell, 473 U.S. 134 (1985).

Plaintiffs argue that such an agreement was entered into by the parties to the November Merger Agreement. To obtain protection under the terms of the original agreement, plaintiffs advance two arguments. First, plaintiffs claim that they accrued rights to double severance benefits through "indirect vesting" by virtue of being third-party beneficiaries of that aspect of the Agreement. Second, plaintiffs contend the parties to the Merger Agreement granted to the plaintiffs "directly vested" contractual rights to double severance benefits by adopting Section 9.3, which prohibits the amending of the Agreement so as to adversely affect the participants therein.

It is clear that if plaintiffs' third-party beneficiary claims were based on state common law, they would be preempted because they "relate to" an employee benefit plan. Pilot Life Insurance Co v. Dedeaux, 481 U.S. 41 (1987). Instead, plaintiffs urge this court to

recognize their contractual rights as a matter of federal common law. ERISA does not contain a body of contract law to govern the interpretation and enforcement of employee benefit plans. Instead, Congress intended for the courts, borrowing from state law where appropriate, and guided by the policies expressed in ERISA and other federal labor laws, to fashion a body of federal common law to govern ERISA suits. Holland, 772 F.2d at 1145, n.5, citing Scott v. Gulf Oil Corp., 754 F.2d 1499, 1501-02 (9th Cir. 1985).

Third-party beneficiary arguments in the context of ERISA have been routinely rejected under ERISA's broad preemption doctrine, Pilot Life, supra.; May v. The Houston Post Pension Plan and the Houston Post Company, 898 F.2d 1068 (5th Cir. 1990). The court, therefore, rejects plaintiffs' third-party beneficiary claim of "indirect" vesting. See, Morales v. Pan American Life Ins. Co., 718 F.Supp. 1297,

1301 (E.D.La. 1989) (Creation of a federal common law of unjust enrichment and third-party beneficiary claims would be inconsistent with ERISA's terms and policies.).

However, there is case law to support plaintiffs' "direct vesting" argument that employers are free to set out by agreement, vesting obligations regarding welfare benefit plans that exceed the requirements of ERISA. Ryan v. Chromalloy American Corp., 877 F.2d 598, 603 (7th Cir. 1989) (parties are free to subject such welfare benefits to vesting requirements not provided by ERISA); Anderson v. John Morell & Co., 830 F.2d 872 (8th Cir. 1987).[5] In Anderson, plaintiff alleged an oral

[5]The court is also cognizant of Bruning v. Mrs. Smith's Frozen Food Co., 894 F.2d 401 (4th Cir. 1989) (opinion not published; text in 1989 Westlaw) where the Fourth Circuit stated "a federal court may not create a rule which has the effect of vesting benefits which, under ERISA regulations, are non-vested." Id. at 3. However, in Bruning, the Fourth Circuit only rejected the right of a district court to create a federal common law based solely on the court's sense of equity. It did not address

contract binding his employer to add to his welfare plan any benefit it added to the plan for employees represented by the Union. While the court considered the contractual obligation as a matter of federal common law, it refused to enforce the agreement, stating:

> Doubtless it is consistent with the intent of Congress for an employer to undertake such an obligation if it elects to do so. We conclude, however, that to accomplish that result there must be a specific, if not written, expression of the employer's intent to be bound.

Id., at 877.

This court concurs with the rationale of these cases that federal common law should recognize contractual obligations relating to ERISA benefits that exceed the requirements of the ERISA statute. However, the court also

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(cont. of fn. 5)
the issue of whether a participant can acquire vested contractual rights to unaccrued and contingent benefits, cognizable under federal common law, based on an employer's written agreement.

agrees that a plaintiff-employee bears a strict burden of proof to show that the contracting parties agreed that - contrary to ERISA - welfare benefits should vest. The court, therefore, will review plaintiffs' claims as it would any other contract claim. With these principles in mind, the court thus turns to the language of the November Merger Agreement to determine if plaintiffs acquired contractually vested rights to double severance pay benefits on the date the Merger Agreement was executed.

The specific provision of the November Merger Agreement relied upon by plaintiffs to prove vesting is Section 9.3 which reads in pertinent part, as follow:

> Section 9.3 Amendment:...and, provided further, that at no time before or after the Effective Time may any amendment be made to Sections 7.7 (including Schedule 7.7) ... that would adversely affect ... the employees of the Company... described therein or who would participate in plans described therein.

Plaintiffs read Schedule 7.7(h), _infra_, as providing _each_ employee, including Greenville employees, terminated within two years of the merger, double separation pay and further read Section 9.3 as prohibiting _any_ amendment to that commitment. Plaintiffs contend that the above provisions read together establish contractually vested rights in the separation pay provisions of the November Merger Agreement and enable plaintiffs, as beneficiaries of Schedule 7.7(h), to enforce their rights.[6]

The Court cannot agree with plaintiffs' interpretation of the provisions of the Merger Agreement. Just prior to the provision relied upon by plaintiffs, Schedule 7.7(h), the Agreement in Schedule 7.7(b) recognized and

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[6] Section 10.6 _Miscellaneous_ reads, in part, "...it is expressly agreed that all of the persons (and their successors and assigns) who are beneficiaries of Sections 7.7 (including Schedule 7.7) ... shall be entitled to enforce such Sections and Schedule against the Parent or the Surviving Corporation...."

provided that "certain plans, programs arrangements, policies and practices of the Company" (Celanese) had been modified by recent Celanese Board action. Several employee benefit plans were modified, but the Greenville Plan was not among those modified.

In the next section, Schedule 7.7(c), the parties then agreed that defendant would at least maintain the level of benefit plans, as modified, already in existence. That section reads, in part:

> Schedule 7.7(c) <u>Employee Benefit Plans:</u> Buyer hereby agrees that, for the period commencing on the date the Buyer accepts for payment Shares pursuant to the Offer and ending two years after the Effective Time, it shall, or shall cause the Company or the Surviving Corporation to, maintain for all employees of the Company... employee benefit plans, programs, arrangements, policies, and practices, which in the aggregate, provide benefits at least as favorable as the benefits presently provided to such employees under the employee benefit plans, programs, arrangements, policies and practices of the Company

> listed on Exhibit 2 hereof [7], (collectively the "Benefit Plans"). It is Buyer's intention thereafter to provide, or to cause the Surviving Corporation to provide, employee benefit plans, programs arrangement, policies and practices, which, in the aggregate, provide to such employees benefits at least as favorable as the benefits presently provided under the Benefit Plans ....

Having thus agreed in section (c) that Hoechst Celanese would maintain, for the two year period following merger, the level of severance pay benefits in existence before the merger, as modified by (b), the parties then further agreed in section (h) to enhanced benefits for those "employees <u>hereafter terminated</u>," during the same two year period, "<u>notwithstanding</u> the terms of the Company's (Celanese) written separation pay policy."

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[7] Separation Pay Plan Benefits are specifically listed under Exhibit 2.

(emphasis added). Consideration of these two provisions together and considering the order in which they appear within Schedule 7.7 leads to the conclusion that the Merger Agreement was never intended to modify or supersede existing benefit plans, but was meant solely to apply to those employees who "hereafter" were terminated by the Surviving Corporation as a result of the merger, and not as a result of a prior business decision to close the Greenville Plant made by defendant's predecessor, Celanese. To construe section (h) otherwise, would negate the provisions of section (c) and the expressed intention to maintain at least those benefit plans in existence.

Further, the language of Section 9.3, which only prohibited amendments that would "adversely affect" employees, says nothing about the vesting of severance or any other benefits, and falls short of the clear and "specific expression" of the parties intent

necessary to deviate from ERISA's statutory scheme regarding vesting. If American Hoechst and Celanese intended to augment the Greenville Plan and vest those rights in plaintiffs, they would not leave it to be inferred from a provision that addresses the right to amend. Absent that clear intent, the Court's adoption of plaintiffs' construction would amount to just the sort of judicial creation of vested rights which was rejected by the Fourth Circuit in Bruning, supra.

Out of an abundance of caution, the court bases its construction of the Merger Agreement not only on the language of the contract, but on extrinsic evidence, which may be properly considered on motion for summary judgment when the meaning of an agreement is unclear. Jaftex Corp v. Aetna Casualty and Surety Co., 617 F.2d 1062 (4th Cir.1980).

The deposition testimony submitted to the court by both parties lends further support to

the court's construction that the parties to the Merger Agreement never intended to grant plaintiffs "vested" welfare benefits, but overlooked the specific exclusion of Greenville employees due to imposition of time constraints and the need for secrecy. The deposition of Ron Silversten, now Vice President and Associate General Counsel of Hoechst Celanese[8] establishes that (1) the drafters worked around the clock from October 29 to November 2, 1986, preparing a draft merger agreement in sufficient enough detail to be submitted to the Celanese Board of Directors for their approval at the scheduled November 2 Board meeting; (2) Celanese was a public company and hence, details of the proposed merger had to be kept secret to avoid insider trading, which

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[8]It is undisputed that Silversten was one of the primary drafters of the November Merger Agreement, particularly with respect to Schedule 7.7. At the time the agreement was drafted, Silversten was Associate General Counsel for Celanese.

prevented the drafters from seeking input from personnel outside a limited circle of individuals; (3) the drafters anticipated that modifications to the Agreement would be necessary after November 2; and (4) the drafters from Celanese wanted to provide protection for Celanese employees who might lose their job as a result of the merger and decided to propose double separation pay for such employees, but the drafters also made a conscious decision to exclude any reference to termination "as a result of the merger" even though that is what the drafters intended.[9]

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[9]An excerpt from Silversten's deposition: "So our goal became, for those people who might be affected by the merger and might possibly lose their job as a result of the merger, to make sure that they were protected.... So in the proposal that went as part of those negotiations and over that weekend, we very quickly said for those people who are going to be affected by the merger and might possibly lose their job as a result of it, we wanted them to be entitled to double severance ....American Hoechst, to a large extent acquiesced. They felt, and I think ...

Immediately after news of the merger was made public, Silversten sent copies of the agreement's schedule 7.7 to all upper level human resource executives in Celanese, explaining that the schedule was drafted hurriedly and asking for comments and suggestions for changes. Within a week, Silversten received several inquiries as to whether Schedule 7.7 applied to Greenville

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(cont. of fn. 9)
they were correct, that they were not going to be terminating a lot of people as a result of the merger... and therefore, they were not particularly concerned about that. So there was not a lot of negotiation about it.... And the question then came up at our end, should we put into 7.7(h) a requirement that says "if you lose your job as a result of the merger," because that's what we intended. And as you note, that is not in 7.7(h)....And the reason it was not in is that we made a determination very early in the game that if that became an element of a person's claim to double severance, so that person would have to prove it in Court ... that would be creating a very significant burden every single time an employee was terminated.... It was discussed between the parties and it was a conscious decision, even though that was a relevant factor, not to put it in there as an extra burden for the employees to have to meet."

employees. Silversten's response was "no" - that the Merger Agreement was designed to protect all employees who lost their job as a result of the merger. All Celanese executives concurred in Silversten's response. Silversten next contacted the outside counsel for American Hoechst to discuss amending Schedule 7.7(h) of the Merger Agreement to make this clarification. Several proposals were discussed among counsel and other Celanese officials which resulted in a final version in late December 1986, formally adopted in February 1987, which excluded Greenville and Salisbury employees from the Merger Agreement's double separation pay provisions.

A grant of summary judgment is appropriate only where it appears from the pleadings, depositions, admissions, answers to interrogatories and affidavits, considered in the light most favorable to the opposing party, that there is no genuine issue as to any

material fact and that the moving party is entitled to judgment as a matter of law. Even under a de novo standard of review, which this court is obligated to undertake pursuant to Firestone Tire & Rubber Co. v. Bruch, 109 S.Ct. 948 (1989), the court concludes that there is no genuine issue of material fact in that, as a matter of contract interpretation, the Merger Agreement did not grant plaintiffs vested contractual rights to the severance pay provisions contained therein.

CONCLUSION

Defendant lived up to its commitment under Schedule 7.7(c) to maintain the level of benefit plans already in existence prior to merger. Each and every employee on the Greenville payroll who was terminated during that three-year period received the single separation pay and other benefits pursuant to the Greenville Plan. Although plaintiffs may feel short-changed because other Celanese

employees may have received more severance pay than plaintiffs received under their Greenville Plan, the fact remains that ERISA simply does not protect these kinds of expectations nor have plaintiffs been divested of any benefits to which they were entitled, contractually or otherwise. The Court therefore determines that defendant is entitled to summary judgment as a matter of law.

IT IS THEREFORE ORDERED that judgment shall be entered for the defendant on all of the following cases:

Donnie R. Finley	89-1517
Joanne P. Beresh	89-1518
Marie R. Creamer	89-1567
Vernon L. McMakin	89-1568
Heartie M. Ferguson	89-1569
Shirley F. Barton	89-1570
James E. Sims	89-1571
Henry A. Kowalewski	89-1572
Charles Q. Lister	89-1591
Hazel M. Bryant	89-1592
Shelby M. Powell	89-1593
Gloria G. Young	89-1594
Melvin C. Irby	89-1614
Michael F. Howard	89-1615
Raymond P. Crone	89-1616
Julia L. Carter	89-1626

Ella M. Jones	89-1627
Margaret J. Reed	89-1628
Beedie D. Watson	89-1629
Essie S. Simmons	89-1652
Martha C. Williams	89-1674
Jacob F. Anthony	89-1675
Hazel T. Channell	89-1676
Gene L. Conwell	89-1677
Eunice A. Evans	89-1690
Mahlon C. Ellison	89-1691
Warren J. Mahaffey	89-1699
Herman D. Grant	89-1700
Jimmy R. Foster	89-1701
Betty M. Melton	89-1702
Mary E. Pruitt	89-1718
Fred N. Peace	89-1719
Edward W. Thompson	89-1720
Brenda J. Simpson	89-1721
David M. Weisner	89-1736
Daisy V. Tolbert	89-1737
Mildred B. Weeks	89-1756
Sylvia D. Roach	89-1757
Frances G. Ware	89-1758
James E. Day	89-1759
T.L. Ballew	89-1802
Carolyn A. Neely	89-1803
Dorothy G. Johnson	89-1804
Johnny F. Armstrong	89-1805
Barbara R. Manley	89-1839
Lois E. Irby	89-1840
Ann D. McMakin	89-1850
William R. Taylor	89-1851
Janet N. Pritchett	89-1852
Ralph E. Adams, et al	89-2374
Virginia Garrett, etc	89-2385
Robert G. Wheeler, et al	89-2719
Jack A. Kelley, et al	89-0256

IT IS SO ORDERED.

/s/JOSEPH F. ANDERSON, JR.
UNITED STATES DISTRICT JUDGE

Greenville, South Carolina

June 22 , 1990

APPENDIX C

UNITED STATES COURT

OF APPEALS

FOR THE FOURTH CIRCUIT

FILED

September 16,1991

No. 90-2423

Donnie R. Finley, Ralph E. Adams, Minnie R. Aiken, Jacob F. Anthony, Johnn F. Armstrong, Laura T. Armstrong, Larry P. Arnold, John L. Austin, Larry F. Austin, Harold L. Ball, Terry L. Ballard, T.L. Ballew, Shirley H. Barton, Donald E. Batson, Joanne P. Beresh, Luree Blassingame, Libby M. Bracken, Roy E. Brown, Mary C. Bruce, Barbara E. Bruster, Hazel M. Bryant, Rodger L. Burton, Edith E. Butler, Lela M. Butler, Roy S. Cagle, Julia L. Carter, George D. Carter, Jr., Gene C. Casey, Lewis E. Casey, Hazel T. Channell, Harry J. Cline, Dorothy B. Clinkscales, Gene L. Conwell, Marie R. Creamer, Raymond P. Crone, Martha A. Cureton, Emmett B. Dailey, Lois S. Davis, James E. Day, Eliza Dennis, James H. Durham, Juanita Durham, James M. Edens, Faye Elgin-Bates, Mahlon C. Ellison, Eunice A. Evans, Lee J. Farmer, Maryland J.

Farmer, Esther L. Ferguson, Heartie M. Ferguson, Jerry Q. Finley, Robert D. Fisher, Jimmy R. Foster, Azalee M. Fredell, Julia M. Gallimore, Virginia Garrett, Personal Representative of the Estate of David M. Garrett, Shirley M. Garrett, James M. Gilliland, Fannie K. Graffinreed, George B. Grant, Herman D. Grant, Wayne D. Grant, William R. Grant, Charles L. Gray, John D. Griffin, Alpha H. Grubbs, Doris M. Hamer, Margaret G. Harmon, Frances Harrison, Michael F. Howard, Barbara M. Hunt, Odell Hunter, John R. Hutchins, Nellie K. Hutchens, Larry E. Hutchins, Lois E. Irby, Melvin C. Irby, Charles G. James, Vivian W. Jenkins, Dorothy G. Johnson, Beattie G. Jones, Ella M. Jones, Cal Jones, Jr., Connie J. Kane-McGuire, Jack A. Kelley, Madge F. Kirby, Eff Knight, Jr., Henry A. Kowaleski, Geraldine Laster, Shirley A. Laster, Roy J. Lesley, Charles Q. Lister, Bobbie P. Lyons, Warren J. Mahaffey, Barbara R. Manley, Donald E. Mason, Julia E. McGee, Elberta McKelvie, Curtis E. McKenzie, Ann D. McMakin, Vernon L. McMakin, Betty M. Melton, Franklin W. Mitchell, Merle Mitchell, Buddy W. Mull, Carolyn A. Neely, Betty J. Nicholson, Harold Odom, Steven F. Payne, Fred N. Peace, Joseph Phelps, Shelby M. Powell, Janet N. Pritchett, Mary E. Pruitt, Margaret J. Reed, Alphesus W. Rentz, Ruby C. Rice, William E. Riddle, Sylvia D. Roach, Joyce T. Robison, Susie J. Rosemond, Leroy Sanders, Essie S. Simmons, Brenda J. Simpson, James E. Sims, Jurline Sims, Bennie L. Smith,

Daisy S. Smith, John T. Smith, Larry K. Smith, John A. Spillers, Roy M. Spurgeon, Margaret E. Starks, Willie L. Stephens, Mary E. Sweeney, William R. Taylor, Edward W. Thompson, Bobby L. Tolbert, Daisy V. Tolbert, Mary A. Turner, Frances G. Ware, Linda D. Ware, Beedie D. Watson, Clarence L. Webb, Sally M. Webb, Mildred B. Weeks, David M. Weisner, Sanford R. Welborn, Robert G. Wheeler, Benjamin L. Williams, James O. Williams, Martha C. Williams, Martha M. Williams, Ricky D. Williams, Patricia B. Wilson, Phillip M. Witham, Mary H. Wofford, Cornell Wrice, Jr., Gloria G. Young, and Clifton O. Zimmerman,

Plaintiffs-Appellants,

v.

Hoechst Celanese Corporation,

Defendant-Appellee.

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

Appellants filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the

suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Chapman, with the concurrence of Judge Boyle and Judge Dupree.

For the Court,

s/ John M. Greacen
CLERK

91-988 (2)

Supreme Court, U.S.
FILED
JAN 17 1992
OFFICE OF THE CLERK

No. 91-888

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

DONNIE R. FINLEY, *et al.*,
Petitioners,
v.
HOECHST CELANESE CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

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TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-888

DONNIE R. FINLEY, *et al.*,
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v.

HOECHST CELANESE CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

STATEMENT OF THE CASE [1]

Petitioners are former employees of Respondent Hoechst Celanese Corporation ("Hoechst") [2] and Respondent's predecessor, Celanese Corporation ("Celanese"), who worked at a manufacturing facility in Greenville, South

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[1] Petitioners' statement of the case omits some basic facts which are material to the decisions rendered below and to this Court's consideration of whether certiorari should be granted. Therefore, in accordance with Supreme Court Rules 15.1 and 24.2, Respondent takes this opportunity to present the Court with a more accurate and informative statement of the case. Petitioners' rendition of the procedural history of this case is sufficient and will not be repeated.

[2] In accordance with Supreme Court Rule 29.1, Respondent declares that it is a wholly-owned subsidiary of Hoechst AG, a German corporation.

Carolina. Petitioners were separated from employment with Hoechst in connection with the closing of that facility. They now seek severance benefits in addition to those already received at the time of their separation. Their claims are based upon the Employee Retirement Income Security Act of 1974 ("ERISA" or "the Act"), 29 U.S.C. § 1001 *et seq.*

In December 1984, Celanese announced the closing of the Greenville Plant, to take place gradually over a three year period. At that time, company officials designed and announced a separation package for Greenville employees [3] which provided them with one week's pay for each year of service with the company, plus an additional week (known as "single separation pay" or a "one-for-one" package) as well as various other attractive benefits. Each Greenville employee who continued his employment until affected by the plant closing was eligible for the separation package, referred to throughout this litigation as the "Greenville Plan."

Celanese communicated the "Greenville Plan" to all Greenville employees at the time the closing was first announced. Details of the plan were further explained and confirmed over the next three years, at employee meetings and through written communications. The communications were always consistent. The Greenville employees were told that they would receive single separation pay. Every employee on the Greenville Plant payroll who was declared excess between December 1984 and the final closing of the plant received the single separation pay as promised.

In the Summer of 1986, in an entirely unrelated matter, Celanese and American Hoechst began to consider

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[3] In contrast to the designation "Employees," which refers only to the Petitioners in this lawsuit, the label "Greenville employees" is used to refer to *all* employees of Celanese's Greenville Plant, *including* Petitioners.

the possible advantages of a corporate merger. American Hoechst, Hoechst AG, and Celanese informally explored merger possibilities for several months before the talks progressed to the stage where an agreement could be drafted. On Wednesday, October 29, 1986, the parties agreed in principle that American Hoechst and Celanese should merge if details associated with such a merger could be agreed upon.

A Celanese Board of Directors meeting had been scheduled for Sunday, November 2, 1986. That quickly became the target date for completing a draft merger agreement to be submitted to the Board for approval. This meant that the entire merger agreement—of which schedule 7.7(h) (the provision for separation pay benefits) was but a small part—had to be drafted in a three to four day period. The drafters and negotiators worked around the clock from Wednesday, October 29, through Sunday, November 2, 1986.

Two related problems arose from this compressed timetable. First, the drafters knew from the beginning that the agreement would have to be drafted in very broad strokes. Given the looming deadline, the parties could not assess and discuss every one of a wide variety of issues, much less cover each one of them in depth. The drafters knew that some issues could be overlooked. They felt certain that some changes might be necessary after November 2, when they could obtain input from others.

Second, since Celanese was a public company, the proposed merger had to be kept secret to avoid any insider trading. This secrecy prevented the drafters from seeking valuable input from personnel outside the very limited circle of knowledgeable individuals. In other words, even aside from the time factor, the element of secrecy practically ensured that some issues would be omitted.

Since the parties were aware of these problems at the drafting stage, they expressly provided for future

changes. In Resolutions adopted by the Celanese Board of Directors on November 2, 1986, the directors authorized the execution of the merger agreement "with such changes or additions thereto as [the corporate] officers may approve." Celanese and American Hoechst knew that the merger agreement adopted by the Board of Directors on November 2 had to receive approval from the Federal Trade Commission (FTC) to become effective. The parties also knew and intended that the merger agreement could be changed at any time prior to the FTC's approval.

The merger agreement authorized by the Celanese Board included a section on separation benefits. Schedule 7.7(h) of the merger agreement provided that employees of the corporate survivor terminated within two years of the merger would be entitled to severance pay in the amount of two weeks' base pay for every year of service with Celanese or Hoechst, plus an additional two weeks' base pay (known as "double separation pay" or a "two-for-one" package)—that is, twice the amount specified in the Greenville Plan.[4]

American Hoechst and Celanese intended that only those employees terminated *as a result of the merger* would get the double separation pay. Although the

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[4] Schedule 7.7(h) of the merger agreement stated, in pertinent part:

> Notwithstanding the terms of the Company's . . . written separation pay policy, for each employee . . . whose employment is hereafter terminated . . . for any reason (other than for cause) at any time prior to January 1, 1989 . . . or who elects to terminate his employment prior to the expiration of the Termination Period by reason of a reduction in his base salary, Buyer will provide, or will cause the Company or Surviving Corporation to provide . . . separation pay, payable in a single sum within ten business days following such termination, equal to two weeks' base salary for each full or partial year of service with the Company and Surviving Corporation plus an additional two weeks' base salary.

Greenville employees were already covered under a separate, previously announced plan, the drafters of the merger agreement did not expressly exclude them from the agreement's double separation pay provision because they were not affected by the merger. When the Greenville question later surfaced, the contracting parties responded that the Greenville employees should be expressly excluded from the effects of schedule 7.7(h) since none of the Greenville employees were being terminated as a result of the merger.

Ron Silversten, Vice President and Associate General Counsel for Celanese, was the person most responsible for drafting schedule 7.7. Immediately after news of the merger was made public—on Monday, November 3, 1986—Silversten sent copies of the agreement's schedule 7.7 to all upper level human resource executives in Celanese. He explained that the schedule was drafted hurriedly and asked for comments and suggestions on any necessary changes.

Within a week, around November 10 or 11, several people asked Silversten if the merger agreement's benefits section was intended to cover the Greenville employees. Silversten told them that he assumed the answer was "no"; that schedule 7.7(h) did not apply to Greenville. His reasoning was that the goal of the merger agreement's drafters was to protect employees *who lost their job as a result of the merger.* However, in order to obtain a definitive answer, Silversten immediately consulted executives of the corporation's fibers operations who confirmed that schedule 7.7(h) was never intended to apply to Greenville employees. American Hoechst also agreed that schedule 7.7(h) should be changed. The final version of paragraph (h), which excluded the Greenville employees from the merger agreement's double separation pay, was adopted by the parties on February 20, 1987, through a formal amendment to the agreement of

merger.[5] The merger was finally approved and consummated on February 24, 1987.

The Greenville employees were notified of their exclusion immediately, in November 1986, when the question was first raised. Other consistent communications followed. In particular, the Celanese Interim Separation Pay Plan ("CISP Plan"), dated February 27, 1987, emphasized that the Greenville employees were excluded from the merger agreement's double separation pay provision. This plan, which applied to both salaried and hourly employees, was established to carry out the terms of the merger agreement between Celanese and American Hoechst as it applied to separation pay arrangements. Separation pay under the plan was to be computed according to the merger agreement's double separation pay provision. However, in keeping with the formal amendment to the merger agreement (accomplished one week earlier), the plan's eligibility provision excluded "employees affected by the previously announced shutdown of the company's Greenville Plant. . . ." Copies of the booklet were obtained by employees and passed by them around the Greenville Plant unofficially. The Employees have admitted that they saw the booklet and its Greenville exclusion.

Despite the long-term, consistent communications and implementation of the Greenville Plan, the Employees claim that they are entitled to the merger agreement's double separation pay benefits. Hoechst contends—and the district and circuit courts agreed—that the Employees received all the benefits to which they were legally entitled.

[5] In its final form, schedule 7.7(h) provided double separation pay to employees separated "for any reason . . . other than the previously announced shutdown of the Company's Greenville, South Carolina plant . . . ."

SUMMARY OF THE ARGUMENT

The questions presented by Petitioners only concern the parties directly involved and are not of sufficient gravity or importance to the general public to warrant review by this Court. In particular, the first reason asserted for review expressly presents a matter of contractual interpretation which would require the Court to review and weigh the evidence and to discuss specific facts before ruling upon the correctness of the decisions below. Furthermore, the second reason is based upon an alleged conflict in the decisions of circuit courts which does not, in fact, exist. The alleged conflict is based upon Petitioners' misreading of the Fourth Circuit's opinion. In reality, both the district court and circuit court recognized the proposition that Petitioners claim was ignored, but each court nevertheless ruled against them. Petitioners' grounds for review amount to nothing more than a complaint that the courts below did not agree with Petitioners' interpretation of the contract.

ARGUMENT

I. PETITIONERS' ASSERTED REASONS FOR GRANTING CERTIORARI DO NOT FIT WITHIN THE WELL-ESTABLISHED CRITERIA ESSENTIAL FOR REVIEW.

The Employees have asserted two reasons for granting certiorari. Neither reason is compelling. The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was conferred upon the United States Supreme Court for two purposes: 1) to secure uniformity of decisions among certain courts; and 2) to bring up questions of importance which it is in the public interest to have decided by the court of last resort. *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 518, 530-31 (1957); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923).

Supreme Court Rule 10 embodies the purposes set forth above. Rule 10 emphasizes the discretionary nature of

review on writ of certiorari. It also indicates the types or "character" of reasons that will be considered by the Court for review. The rule itself expressly declares that the reasons enumerated therein are not all-inclusive. However, in order for a case to be reviewed, the reasons asserted must either fall within Rule 10 or otherwise present matters of exceptional gravity or importance to the general public. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916) (jurisdiction to review judgments of courts of appeals by certiorari is to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision); *In re Woods*, 143 U.S. 202 (1892). The reasons asserted for review in this case do not satisfy the above-stated criteria.

II. THE FIRST ASSERTED REASON PRESENTS A FACT-SPECIFIC QUESTION OF CONTRACTUAL INTERPRETATION WHICH IS ONLY IMPORTANT TO THE PARTIES DIRECTLY INVOLVED.

The first reason asserted for review does not expressly fit within one of the categories enumerated in Supreme Court Rule 10. Neither does it present an issue of significant gravity or importance to the general public. Rather, the first reason asserted for review by Petitioners presents a question of contractual interpretation which concerns only the parties directly involved in this dispute. Only the Employees and Hoechst have any significant stake in this controversy. The Employees claim that the circuit court's interpretation of the contract was incorrect, while Hoechst agrees with the court's interpretation. If this Court were to review that interpretation, the conclusion—whether an affirmance or a reversal—would still impact only the relatively few people who could assert claims under that particular contract. That is not a sufficient ground for review. Certiorari will not be granted to review a judgment of a court of appeals where the case, however important it may be to the petitioners, does not

involve a question of gravity or general importance, or present a conflict between decisions of certain courts. *Fields v. United States*, 205 U.S. 292 (1907); *see also Rudolph v. United States*, 370 U.S. 269, 270 (1962) (writ of certiorari was dismissed as improvidently granted where case involved merely a review of findings of fact which would be of no importance save to the litigants themselves), *reh'g denied*, 371 U.S. 854 (1962).

Furthermore, certiorari generally will be denied where the ground asserted for review would require the Court to review and weigh evidence and to discuss specific facts in order to rule upon the correctness of the decision below. *Texas v. Mead*, 465 U.S. 1041, 1043 (1984); *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see also United States v. ITT Continental Baking Co.*, 420 U.S. 223, 226 n.2 (1975) (issue whether FTC consent order had been violated did not merit Supreme Court's grant of petition for certiorari to review court of appeals' judgment, where such issue concerned only a particular order as applied to a discrete set of facts). That is precisely what the Employees have asked the Court to do in this instance. The Employees have argued all along that the language found in section 9.3 of the merger agreement should be interpreted as a clear and specific expression by the parties of an intent to vest severance benefits, such that the parties could not later go back and amend the benefits provision. The district court declined to interpret section 9.3 in that manner, looking first at the contractual language by itself and then, alternatively, in light of extrinsic evidence. The Fourth Circuit affirmed the district court's decision, largely on the basis of its contractual interpretation.

The Employees have failed twice in their attempts to get a federal court to agree with their interpretation of the contract. Now, they are asking yet another court to view the facts, weigh the evidence, and interpret the contract in a manner consistent with their own interests.

Such a self-serving endeavor is obviously of no importance to the general public. In addition, since the question presented is one of interpretation of a very specific provision of a contract, it is not likely to be a question which will recur or present a conflict among circuit courts in the future.

III. THE FOURTH CIRCUIT'S JUDGMENT IS CONSISTENT WITH THE JUDGMENTS OF OTHER CIRCUIT COURTS AND, THUS, THERE IS NO CONFLICT AS ASSERTED IN THE SECOND REASON.

The second reason which the Employees assert as a ground for review is that there is a conflict between the Fourth Circuit's decision and prior decisions of other circuit courts of appeals. The Employees claim that the Fourth Circuit erred by failing to recognize that "under federal common law, an employer may vest severance benefits by clear, written expression of intent to do so, after which time the employer may not eliminate those benefit entitlements." Petition for Writ of Certiorari at 18 (December 16, 1991) (hereinafter referred to as "Petition"). The Employees' claim is incorrect. The Fourth Circuit *did* recognize that concept and, therefore, there is no conflict among the circuit courts.

In its briefs and arguments before the district court, Hoechst admitted that, in general, contracting parties may agree to provide in plan documents that severance benefits will vest. Hoechst pointed out, however, that before any contractual provision may supplant the well-established statutory scheme of vesting, there must be a specific expression of the employer's intent to be bound. Thus, Hoechst agreed with and cited the very proposition which the Employees claim was ignored.[6] Hoechst merely

[6] The Employees cite four cases in support of their argument that an employer may bind itself to vest severance benefits. All four cases support Hoechst's position, and all four were cited or dis-

argued that the proposition was not dispositive in this case.

The district court expressly recognized the concept at issue by stating that "[t]his court concurs with the rationale of these cases that federal common law should recognize contractual obligations relating to ERISA benefits that exceed the requirements of the ERISA statute." Dist. Ct. Order No. 2 at Petition B-19 (June 22, 1990) (discussing *Ryan v. Chromalloy American Corp.*, 877 F.2d 598 (7th Cir. 1989) and *Anderson v. John Morrell & Co.*, 830 F.2d 872 (8th Cir. 1987)). However, after interpreting the language of the merger agreement, the district court held that the facts of this case did not demonstrate the existence of an agreement to vest. Dist. Ct. Order No. 2 at Petition B-24 to -25 (June 22, 1990). Therefore, ERISA's statutory scheme remained intact, and the severance benefits could be reduced or eliminated by amendment. *Id.*

Both parties also briefed and argued this issue before the Fourth Circuit Court of Appeals. Hoechst again referred to and discussed the above-stated proposition of federal common law, but argued that it did not entitle the Employees to extra benefits under the circumstances

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cussed by Hoechst in its briefs and arguments before the two lower courts. For example, *Anderson v. John Morrell & Co.*, 830 F.2d 872 (8th Cir. 1987) and *Ryan v. Chromalloy American Corp.*, 877 F.2d 598 (7th Cir. 1989) both stand for the proposition that, in order to make severance benefits vest—and, thus, deviate from the statutory scheme—there must be a clear and specific expression of the employer's intent to be bound. Hoechst simply argued, and the courts agreed, that the evidence in this case did not demonstrate such an intent to vest. Further, Hoechst brought the case of *Howe v. Varity Corp.*, 896 F.2d 1107 (8th Cir. 1990), to the district court's attention in a special post-hearing brief. In a case construing contractual language similar to the case at bar, the *Howe* court showed very persuasively that the language of section 9.3 did not provide the clear and specific expression necessary to create a "vesting trigger" and take the severance benefits outside the normal statutory scheme of vesting.

of this case. The court of appeals interpreted the contractual language in light of ERISA and federal common law, agreed with Hoechst, and affirmed the district court's decision. The Fourth Circuit held that "the contracting parties were free to alter or eliminate any severance benefits which the Merger Agreement conferred on the appellants." Circuit Ct. Order at Petition A-19 (Aug. 21, 1991). The holding of the court was not that the parties lacked the power to make the benefits vest, but rather that they simply did not do so. The alleged conflict among the circuit courts on a question of law, therefore, does not exist.[7]

The issue again is essentially one involving the interpretation of a particular contract.[8] The Fourth Circuit Court of Appeals interpreted the contract in the same manner as the district court, that is, that it did not entitle the employees to double severance benefits. To put it another way, the language of the merger agreement did not automatically vest benefits in the Employees and preclude the contracting parties from later amending the plan. The conclusion is the same whether one looks at

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[7] The Employees' second asserted reason for granting certiorari is based on a misreading of the circuit court's opinion. The Fourth Circuit never *said* anywhere, either expressly or impliedly, that it refused to recognize the concept of federal common law which the Employees espouse (and Hoechst and the district court cited with approval). Even if this Court were to read the circuit court's decision in the same way as Petitioners, this would not be a case worth granting certiorari because it is not the "best vehicle" for addressing the alleged conflict. The Court should only grant certiorari in a case where the circuit court *expressly* refuses to recognize the concept, bases its judgment on that refusal, and thereby places itself in direct and unmistakable conflict with the decisions of other circuit courts.

[8] This is especially evident from the Employees' reasoning in their Petition that "[i]t is hard to imagine *language in a plan document* that could be any more clear of an intent to vest severance benefits than the language used in the Merger Agreement." Petition at 20-21 (emphasis added).

the circuit court's holding in terms of contract interpretation or federal common law. Under either view, the circuit court affirmed the district court's opinion that the contract in question gave the Employees no legal right to vested severance benefits. Thus, the Employees had received everything to which they were entitled.

CONCLUSION

For the reasons stated above, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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